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No. 958

In the Supreme Court of the United States

OCTOBER TERM, 1962

MARCOS PEREZ JIMENEZ, PETITIONER

v.

GUY W. HIXON, UNITED STATES MARSHAL, SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION,

and

MANUEL ARRIESGUIETA, CONSUL GENERAL OF THE REPUBLIC OF VENEZUELA, MIAMI, FLORIDA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The United States District Court for the Southern District of Florida wrote no opinion. Its order of August 23, 1961, dismissing the petitions for habeas corpus and discharging the orders to show cause appears in the transcript at pp. 130–135 and, as orally rendered, in Appendix B to the petition. The opinion

of the Court of Appeals dated December 12, 1962 (Pet. App. 1a–28a), is reported at 311 F. 2d 547.

JURISDICTION

The judgment of the Court of Appeals was entered on December 12, 1962. On March 8, 1963, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including March 29, 1963. The petition was filed on March 28, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Article III of the Constitution bars a United States district judge from sitting as a committing magistrate in international extradition proceedings as provided by 18 U.S.C. 3184.

2. Whether common financial crimes such as embezzlement and breach of trust are non-extraditable political offenses when charged against the former head of a foreign government, responsible by reason of his office for the administration of public funds, property, and contracting authority.

STATUTES INVOLVED

The pertinent portions of Article III of the Constitution, of Articles II and III of the Extradition Treaty between the United States and Venezuela, and of the extradition statute, 18 U.S.C. 3184, *et seq.*, are reprinted in the petition, pp. 4–6.

STATEMENT

Extradition proceedings were instituted against petitioner in the Southern District of Florida in August

1959. The Venezuelan Consul General, on behalf of the Republic of Venezuela, was the complainant. Petitioner was charged with complicity in the commission of four murders and with committing certain financial crimes (including, under the final complaint, embezzlement, criminal malversation, receiving money and property known to have been unlawfully obtained, and fraud or breach of trust) (Tr. 851–886). A warrant of arrest was issued by United States District Judge Lieb on August 24, 1959 (Tr. 462). Petitioner was arrested the next day and brought before United States District Judge Choate, who released him on bail (Tr. 463). A motion to quash the warrant of arrest was heard by United States District Judge William C. Mathes of the Southern District of California, then sitting in the Southern District of Florida by special assignment (Tr. 464 *et seq.*). Judge Mathes granted the motion to quash on September 24, 1959, received for filing an amended complaint, and issued a new warrant of arrest under which petitioner's release on bond was continued (Tr. 568–569, 581–583). Hearings on various motions and other preliminary matters were held before Judge Mathes. Judge Mathes was last designated by the Chief Justice to act as a district judge and to hold a district court in the Southern District of Florida "during the period * * * ending February 29, 1960, and for such further time as may be required to complete unfinished business" (Tr. 2793–2794).

On March 8, 1960, a second amended complaint was filed with Judge Mathes (Tr. 851–887) and a third

warrant of arrest was issued by him (Tr. 888–889). All of the evidence in support of the allegations in the complaint was documentary. After being translated, the documents were filed on April 9, 1960 (Tr. 972) and admitted into evidence on May 10, 1960 (Tr. 1029, 1039, 1071–1072).

Judge Mathes, by letters dated September 30, 1960 and October 4, 1960, addressed to the Chief Judge of the Fifth Circuit, withdrew from further responsibility in all Miami cases (Tr. 2796). On October 7, 1960, the Judicial Council of the Fifth Circuit, wishing "to avoid doubt as to jurisdiction or power to act", ordered "that any matters which might be considered 'unfinished business' still being or contemplated to be heard or considered by Judge Mathes under such designation shall be assigned to some other judge" (Tr. 2793–2796). On March 6, 1961, Chief Judge Whitehurst assigned this cause to himself (Tr. 2924–2925).

On April 24, 1961, Judge Whitehurst began to hear petitioner's defense (Tr. 3066). All evidence in support of the complaint had been earlier presented to Judge Mathes (Tr. 2517–2519, 2934–2935). On June 16, 1961, Judge Whitehurst determined that there was probable cause to believe the defendant guilty of the financial crimes, but found the evidence insufficient to establish his complicity in the homicides[1] (Tr. 4253–4254). Judge Whitehurst thereupon revoked petitioner's bond and committed him to the custody of the Marshal in accordance with 18 U.S.C. 3184 (Tr. 4261–

[1] The latter charges are no longer involved in this proceeding.

4262).[2] On June 23, 1961, the judge certified his findings, together with a transcript of the evidence, to the Secretary of State (Tr. 4316–4322).

On June 29, 1961, petitioner filed an amended habeas corpus petition (Tr. 63–76), initiating the proceedings sought to be reviewed here. He challenged the legality of his detention on a number of grounds, most of which are not pressed here. District Judge McRae issued an order to show cause on the amended petition; returns and responses were duly filed and the matter was heard before the judge on August 22 and 23, 1961. At the conclusion of the hearings on August 23, 1961, Judge McRae announced his order dismissing the petitions for habeas corpus, discharging the orders to show cause thereon, and enlarging petitioner under bond of $100,000 (Tr. 238–243). The Court of Appeals affirmed.

ARGUMENT

We consider primarily the two questions strenuously urged in the petition: (1) whether it is compatible with the limitations imposed by Article III of the Constitution for Congress to authorize a judge who is a member of an Article III tribunal to act as an extradition magistrate; and (2) whether the provision of our extradition treaty with Venezuela excluding political offenses immunizes the former head of state from the extradition process. In our view, both of these issues have been correctly decided and there is no occasion for review by this Court.

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[2] Petitioner was released on bond almost immediately by Judge Choate, acting in the pending habeas corpus proceeding previously instituted by petitioner on April 13, 1961 (Tr. 61).

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The remaining questions, which the petitioner denominates as procedural issues, relate to the capacity of a visiting judge to entertain an amended complaint and to issue a new warrant while he is completing unfinished business, and the alleged failure of the succeeding extradition judge who committed the petitioner to consider the evidence in the case. These claims are not seriously advanced as grounds for granting the writ and are insubstantial.[3]

1. THE CONSTITUTIONAL ISSUE

Belatedly[4] and with doubtful standing to do so,[5] petitioner attempts to agitate broad questions re-

[3] There is no substance to the suggestion that this Court's grant of certiorari in *Aristeguieta* v. *First National City Bank*, 365 U.S. 840, Nos. 1 and 4, this Term, affects the questions presented by the instant petition. Those cases involve only the availability of certain compulsory process in extradition matters, the courts of appeals in both instances having denied their use to the representative of the demanding government. If this petition is denied, those issues will be mooted. Should the Court grant certiorari here, consideration of those cases should still be deferred, for if petitioner prevails on his constitutional claim the issues raised there will probably be mooted.

[4] Petitioner invokes Article III for the first time in this Court, more than three years after the event. When these questions were raised *sua sponte* by the court of appeals during the oral argument petitioner conceded the constitutionality of authorizing a district judge to act as a committing magistrate in extradition. (Pet. 9a–10a.)

[5] In contrast to the petitioner in *Lurk* v. *United States*, decided *sub. nom. Glidden Company* v. *Zdanok*, 370 U.S. 530, who claimed the benefit of a "life-and-death" judge, *id.*, at 605 (dissenting opinion of Mr. Justice Douglas), it is difficult to appreciate how this petitioner was prejudiced because he got (so he says) *more* than his constitutional due by having his case decided by an Article III judge rather than a mere commissioner.

specting the constitutional boundaries of the judicial power. But, as we view the case, those large issues are not presented here. Disposition of this matter does not require re-examination of all the decisions from *Hayburn's Case*, 2 Dall. 409, to *Glidden Company* v. *Zdanok*, 370 U.S. 530, which touch on the distinction between the functions of Article III courts and other tribunals. Nor is it even necessary to decide whether a United States District Court, as such, could constitutionally entertain an extradition petition. For present purposes, it is unimportant whether the extradition judge who handled these proceedings exercised the judicial power vested in him as a member of an Article III court or acted as a commissioner expressly authorized by Congress to hear and determine the question. We may assume that he was acting as a mere administrative magistrate and that the court itself could not have adjudicated the matter.* For, whether or not the business is judicial in the strict constitutional sense, it is conceded that Congress could assign the task to officers who do not enjoy Article III status, including state judges and commissioners. And, of course, no one disputes that Congress has purported to authorize federal judges to handle extradition proceedings. The only remaining question then is whether

* So saying, we reserve the question whether an Article III *court* might have handled the case, in the event the Court should disagree with our premise. See *Ballmann* v. *Maisan*, 197 U.S. 169; *McGrath* v. *Kristensen*, 340 U.S. 162, 167–168.

18 U.S.C. 3184 provides in pertinent part:

> Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any commis-

the magistrate in this case was constitutionally barred from acting in the premises because he is also a member of an Article III court.

There is certainly no novelty in the suggestion that individual judges may perform certain acts which the courts to which they belong might not. From the time of the First Judiciary Act of 1789 and for over a century, Justices of this Court sat as trial judges, adjudicating controversies which the Court, as such, lacked original jurisdiction to entertain under Article III. Likewise, here, the extradition statute purports to authorize a member of this Court to act as a committing magistrate, although the Court itself could not perform that function.[7a] Clearly, therefore, *all* the limitations imposed on courts by Article III

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sioner authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. * * *

The reference to "any justice" of this Court and to "any judge" of a state appellate court, where a quorum is required for decision (see, *e.g.*, 28 U.S.C. 1), makes it clear that the extradition function is intended to be conferred on judges and not on courts.

[7a] While there are perhaps no *constitutional* problems involved, it is noteworthy that the present assignment provisions of the Judicial Code treat most federal judges, except active members of this Court, as interchangeable without regard to the territorial or subject matter limitations on the jurisdiction of their respective courts. 28 U.S.C. 291–296.

do not inhibit the judges of such courts. The issue here is whether the restriction of constitutional courts to strictly judicial business applies with equal force to judges.

That question, it seems to us, has long since been foreclosed. Indeed, from the first, a majority of the Justices of this Court, sitting on circuit, indicated that federal judges are free to handle non-judicial matters referred to them by the Congress, provided only the reference is plainly to them as judges, and not as a court. See the Note to *Hayburn's Case*, 2 Dall. 409, 409–13. And the Court itself so stated in *United States* v. *Ferreira*, 13 How. 47–50.[*] The principle is clear: "[a] court is not a judge, nor a judge a court." *Todd* v. *United States*, 158 U.S. 278, 284. In another case, the question might arise how far a judge can stray from the constitutional role of his court, though even there the issue is perhaps one of propriety rather than constitutionality. See Hart and Wechsler, *The Federal Courts and the Federal System*, pp. 102–105. But we encounter no such difficulty here. For, if the extradition magistrate does not exercise judicial power in the strictest sense, his function is nonetheless judicial in most respects and it is one that a judge can perform without the slightest embarrassment to his court.

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[*] The only caveat raised in the Opinion, and left unresolved—whether the judge's authority to sit as a commissioner depends upon a separate presidential appointment, confirmed by the Senate, *id.*, at 50–51, is no longer in doubt. At least, no one would now suggest that such a procedure is necessary before a district judge can perform the duties of a United States commissioner. See 18 U.S.C. 3041. It is settled that Congress properly invested the court itself with power to appoint commissioners. See 28 U.S.C. 631; *Rice* v. *Ames*, 180 U.S. 371, 378.

Indeed, this Court long ago approved the assignment of extradition duties to federal judges. Even before the enactment of the first extradition statute in 1848 (9 Stat. 302), the Court sustained (*In re Metzger*, 5 How. 176, 188–189) the current procedure of referring to a district judge the question whether there is probable cause to believe the fugitive has committed an offense covered by the treaty:[*]

> The mode adopted by the executive in the present case seems to be the proper one. Under the provisions of the constitution, the treaty is the supreme law of the land, and, in regard to rights and responsibilities growing out of it, it may become a subject of judicial cognizance. * * *
>
> Whether the crime charged is sufficiently proved, and comes within the treaty, are matters for judicial decision; and the executive, when the late demand of the surrender of Metzger was made, very properly as we suppose, referred it to the judgment of a judicial officer. The arrest which followed, and the committal of the accused, subject to the order of the executive, seems to be the most appropriate, if not the only, mode of giving effect to the treaty.

Immediately after Congress formalized the procedure, the Court again ratified it. *In re Kaine*, 14 How. 103.[*] And despite the many extradition cases reaching this Court in the following hundred years, the authority of district judges to act as extradition magistrates has never been questioned since.

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[*] While the matter was there handled by a commissioner, the prevailing opinion generally approved reference to "judicial magistrates," expressly adverting to federal district judges as

Nor is it surprising that the propriety of assigning to federal judges a role in international extradition has gone so long unchallenged. For to attack that procedure after more than a century is to question the undisputed competence of Article III judges to act as committing magistrates in domestic cases. As the Court itself has repeatedly observed, there is no real distinction to be drawn between the two functions. *Benson* v. *McMahon*, 127 U.S. 457, 463; *In re Luis Oteiza y Cortes*, 136 U.S. 330, 334–335; *Charlton* v. *Kelly*, 229 U.S. 447, 459–461; *Collins* v. *Loisel*, 259 U.S. 309, 316; *Factor* v. *Laubenheimer*, 290 U.S. 276, 291.[9] The same officers are authorized to act in both instances; the same test applies; the decision in each case has the same limited finality—discharge, without prejudice to a new complaint, or temporary commitment, subject to further action by another independent agency;[10] and, for the same reason, neither order is appealable.[11]

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properly included among them. *Id.*, at 110, 115. Mr. Justice Curtis did not question the proposition. See *id.*, at 119. While the dissenters thought the matter should be referred to the Judiciary by the Executive of this country, rather than the demanding government, they did not question the propriety of assigning the task to a United States district judge. *Id.*, at 141–143.

[9] *Collins* v. *Miller*, 252 U.S. 364, 369, does not describe the commitment proceedings differently. In using the language quoted by the petitioner (Pet. 35), Mr. Justice Brandeis was speaking of the order issued by the habeas corpus judge and not a commitment proceeding either in extradition or in the usual criminal case.

[10] Until the adoption of the Rules of Criminal Procedure in 1946 (see Rule 48(a)), the Attorney General or the United States Attorney was free to dismiss a complaint after commitment. See *Confiscation Cases*, 7 Wall. (74 U.S.) 454, 457.

[11] As to the non-appealability of the extradition order, see

See 18 U.S.C. 3041. Clearly, there is no more basis for doubting the propriety of the judge's intervention in one case than in the other.

We conclude that petitioner's challenge of a power expressly conferred by Congress more than a century ago, confirmed by this Court and sanctioned by long and unquestioned practice does not present a substantial question.

2. THE TREATY ISSUE

Petitioner does not here challenge the finding of the extradition magistrate that there is probable cause to believe him guilty of the financial crimes charged. He no longer contests the conclusion that the offenses disclosed by the evidence are among the extraditable crimes described in Article II of the treaty. Nor does petitioner dispute the determination that each of the offenses was committed for his own "private financial benefit" (Tr. 4320). These factual conclusions are, in any event, insulated from collateral attack. See *Fernandez* v. *Phillips*, 268 U.S. 311, 312; *Charlton* v. *Kelly*, *supra*, at p. 457; *McNamara* v. *Henkel*, *supra*, at pp. 523, 525; *Terlinden* v. *Ames*, *supra*. Yet petitioner insists that the crimes alleged are "of a political character" and therefore excluded under Article III of the extradition treaty (Pet. 6). He does so apparently on two grounds: (1) that a former head of state, enjoying dictatorial powers, is immune from

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In re Kaine, *supra*, at 119; *In re Luis Oteiza y Cortes*, *supra* at 834; *Bryant* v. *United States*, 167 U.S. 104; *Terlinden* v. *Ames*, 184 U.S. 270, 278; *McNamara* v. *Henkel*, 226 U.S. 520.

extradition for crimes or acts committed in violation of his office, and (2) that the political character of offenses under the treaty must be viewed not as of the time of their commission, but in the light of the political relationship between the accused and those now in power and their motivation in seeking his extradition.

Neither proposition will survive its statement. It borders on the absurd to suggest that a dictator who, by abusing his position of power, commits common theft for his own advantage is insulated merely because he holds the highest office.[12] The situation might conceivably be different if the crimes were committed at a time of political upheaval and the funds were used to further a political objective. But there is no such allegation here.

Nor is there any doubt that the political character of an offense must be determined in accordance with the circumstances existing at the time the crime is alleged to have been committed. The motivation of a succeeding government in seeking the extradition of the accused cannot alter the nature of the offense. Whether the demanding government is moved by a concern for justice, by political considerations or by vindictiveness is not a justiciable issue. It is, rather, a

[12] Invocation of the Act of State Doctrine with respect to crimes committed for personal gain is difficult to understand. *Underhill* v. *Hernandez*, 168 U.S. 250. But, in any event, the claim is foreclosed by the solemn demand of petitioner's government which charges violations of its national laws. Cf. *Oetjen* v. *Central Leather Co.*, 246 U.S. 297.

question for the political department of this government and for the Secretary of State. *In re Lincoln*, 228 Fed. 70, affirmed *per curiam*, 241 U.S. 651; *Laubenheimer* v. *Factor*, 61 F. 2d 626, 628 (C.A. 7), affirmed, 290 U.S. 276; *In re Ezeta*, 62 Fed. 972, 982 (N.D. Calif.). Certainly, petitioner's fears cannot weigh in the decision of the extradition judge. Article XV of the treaty between the United States and Venezuela provides that no person shall be tried for any crime or offense other than that for which he was surrendered. This Court must assume that the demanding government, recognized by the United States as a friendly sovereign, is not subverting the treaty in asking petitioner's surrender and that it will give him a fair trial. *Glucksman* v. *Henkel*, 221 U.S. 508. See, also, *Ramos* v. *Diaz*, 179 F. Supp. 459, 463 (S.D. Fla.).

3. PROCEDURAL ISSUES

Under the broad heading of procedural issues, petitioner contends that Judge Mathes acted in this matter after the expiration of his designation and that the orders entered by him thereafter cannot stand. Judge Whitehurst's participation in the case is likewise challenged because he did not issue a new warrant of arrest and start the case anew, and also because he allegedly failed to read the record. These issues are said to arise because of uncertainty as to the constitutional capacity of a district judge to participate in Section 3184 proceedings. However, they are

not emphasized as bases for granting review and, in any event, do not merit the Court's consideration."[13]

Judge Mathes, a district judge from the Southern District of California, was assigned to the District Court for the Southern District of Florida. He was thereby invested with "all the powers of a judge" of that court and authorized "to perform any duty which might be required of a judge" of the court. 28 U.S.C. 296. The last designation covered a period ending February 29, 1960, "and for such further time as may be required to complete unfinished business." Prior to February 29, Judge Mathes had issued a warrant of arrest and conducted hearings. On March 8, 1960, while still properly sitting in the Southern District of Florida for the purpose of completing unfinished business, a second amended complaint was presented to him and he issued a new warrant of arrest. The proceedings were not begun anew, and rulings theretofore made continued in force. It is accordingly clear that the extradition proceeding over which Judge Mathes had been presiding since the preceding September was "unfinished business" properly before him until he was relieved of duty on October 7, 1960, by the Judicial Council for the Fifth Circuit. In any event, having failed to object at the earliest practicable moment, petitioner has no standing to complain at this late date. *McDowell* v. *United States*, 159 U.S. 596, 602. Judge Mathes, if not a judge *de jure* in

[13] Petitioner understandably does not claim to have been prejudiced by the change in judges. For Judge Mathes received all the evidence of the demanding government, entirely documentary, and Judge Whitehurst, who decided the matter, heard all of petitioner's

March 1960, was at least one *de facto*. As this Court pointed out in *Glidden Company* v. *Zdanok*, *supra*, at p. 535:

> * * * Although a United States Attorney may be permitted on behalf of the public to upset an order issued upon defective authority, *Frad* v. *Kelly*, 302 U.S. 312, a private litigant ordinarily may not. *Ball* v. *United States*, 140 U.S. 118, 128–129.

Petitioner challenges the participation of Judge Whitehurst in the extradition proceeding essentially on two grounds: (1) that he never issued a warrant of arrest and (2) that he did not read all of the evidence submitted on behalf of the demanding government.

The purpose of a warrant of arrest, as 18 U.S.C. 3184 makes plain, is to apprehend the person charged "that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered." On March 23, 1961, after the conclusion of a preliminary conference between the court and counsel, Judge Whitehurst fixed the date for the presentation of petitioner's evidence and ordered petitioner to be personally present in court at said hearing (Tr. 3013). This fulfilled the purpose of the statute and is plainly the equivalent of a warrant of arrest.

The contention that Judge Whitehurst did not consider all of the evidence presented by the demanding government is equally without merit. Even if petitioner is entitled to rely on an isolated comment made by Judge Whitehurst at an informal hearing on June 23, 1961 (Tr. 4293), he shows no prejudice.

There is no suggestion that counsel's summary of the evidence, which the judge quite reasonably used as an aid, was in any respect inaccurate. Nor can there be any complaint that Judge Whitehurst ignored petitioner's evidence, for, as stated, all of it was presented to him for the first time. There is no pretext for going behind the judge's certificate to the Secretary of State which recites that the decision was reached "upon consideration of all the evidence submitted, the pleadings of the parties, the arguments of counsel, written and oral, and the orders heretofore entered herein" (Tr. 4316). See *United States* v. *Morgan*, 313 U.S. 409, 421–422.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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